

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ZONEPERFECT NUTRITION COMPANY)
Plaintiff,)
v.)
HERSHEY FOODS CORPORATION,)
HERSHEY CHOCOLATE &)
CONFECTIONERY CORPORATION,)
BARRY D. SEARS, and ZONE LABS, INC.,)
Defendants.)
CIVIL ACTION NO. 04-30760-REK
JUN 1 2004
51

**ANSWER TO HERSHEY FOODS CORPORATION'S AND HERSHEY
CHOCOLATE & CONFECTIONERY CORPORATIONS' COUNTERCLAIMS AND
UNCLEAN HANDS DEFENSE**

Plaintiff ZonePerfect Nutrition Company (“ZonePerfect”), hereby responds to Defendant Hershey Foods Corporation’s and Defendant Hershey Chocolate & Confectionery Corporations’ (collectively “Hershey”) counterclaims and unclean hands defense (the “Counterclaim”). ZonePerfect states as follows:

COUNTERCLAIMS AND UNCLEAN HAND DEFENSE

No response to the unnumbered introductory paragraph of the Counterclaim is required, as it merely characterizes Hershey's request for relief, and/or states conclusions of law, and not averments of facts. To the extent the paragraph contains any factual allegations requiring a response, those allegations are denied.

1. No response to the first sentence of paragraph 1 of the Counterclaim is required, as it merely characterizes Hershey's request for relief, and/or states conclusions of law, and not

averments of facts. To the extent the first sentence of paragraph 1 contains any factual allegations requiring a response, those allegations are denied. ZonePerfect denies the remainder of the allegations in paragraph 1.

2. No response to paragraph 2 of the Counterclaim is required, as it merely characterizes Hershey's request for relief, and/or states conclusions of law, and not averments of facts. To the extent the paragraph contains any factual allegations requiring a response, those allegations are denied.

3. ZonePerfect is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 3 of the Counterclaim.

4. ZonePerfect is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 4 of the Counterclaim.

5. ZonePerfect admits the first sentence of paragraph 5. ZonePerfect admits that it markets and distributes nutritional products such as bars, shake mixes and prepared meals. Except as so admitted, ZonePerfect denies the allegations contained in paragraph 5.

6. The allegations contained in paragraph 6 of the Counterclaim state conclusions of law, and not averments of facts, and therefore require no response.

7. The allegations contained in paragraph 7 of the Counterclaim state conclusions of law, and not averments of facts, and therefore require no response.

8. ZonePerfect states that Barry Sears ("Sears") is the author of several books, including 1995's The Zone, which describes a diet balanced between carbohydrates, proteins and fats, also known as the "Zone Diet." Except as so admitted, ZonePerfect denies the allegations in paragraph 8.

9. ZonePerfect admits that in 1996, Sears co-founded and became the first President of ZonePerfect's predecessor, Eicotech Corporation, and that he assisted in the development of numerous ZonePerfect products including the extruded bars first sold by ZonePerfect. ZonePerfect admits that a contract is attached to its complaint as Exhibit 19, which documents speaks for itself, and therefore requires no response. Except as so admitted, ZonePerfect denies the allegations in paragraph 9.

10. ZonePerfect is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 10 of the Counterclaim. To the extent Paragraph 10 refers to the January 1, 2004 contract between Sears, Zone Labs and Hershey, speaks for itself, and therefore requires no response.

11. ZonePerfect admits that a February 9, 2004 marketing and advertising announcement (the "February 9, 2004 Advertisement") published by Hershey, states in part:

Hershey Foods Corporation and Dr. Barry Sears today announced plans to introduce the first-ever nutrition bars with the science-based nutritional benefits of the Zone Diet and the great taste consumers expect from Hershey. The products will be the first to carry the "Dr. Sears Zone Approval" seal and will be introduced during the third quarter.

"Our new partnership with Dr. Sears is an outstanding match of Hershey's strong brand-building and business-system capabilities with his world-renowned dietary expertise," said Richard H. Lenny, Chairman, President and Chief Executive Officer, Hershey Foods Corporation. "Together, we'll create innovative new products that deliver the superior nutritional benefits of his Zone Diet and the great taste consumers expect from Hershey. This is an exciting opportunity for us as we further expand our presence in the nutrition snack segment and work with Dr. Sears to meet the growing consumer demand for sound nutrition, convenience and a healthy lifestyle."

See February 9, 2004 Advertisement, attached to ZonePerfect First Amended Complaint as **Exhibit 24**. Except as so admitted, ZonePerfect denies the allegations in paragraph 11.

12. ZonePerfect admits to the allegation of the first sentence of paragraph 12 of the Counterclaim. ZonePerfect denies the remaining allegations of paragraph 12 of the Counterclaim.

13. ZonePerfect advertises its bars as compliant with a ratio of 40% carbohydrates and 30% each of proteins and fats. Except as so admitted, ZonePerfect denies the allegations in paragraph 13.

14. ZonePerfect admits that Sears has not been affiliated with ZonePerfect since 2001. Except as so admitted, ZonePerfect denies the remaining allegations of paragraph 14 of the Counterclaim.

15. ZonePerfect admits it maintains a website with the address <http://www.zoneperfect.com>. Except as so admitted, ZonePerfect denies the remaining allegations of paragraph 15 of the Counterclaim.

16. ZonePerfect admits that a banner on the top of each page of its website states that it is the "Official Website of the Zone Diet." ZonePerfect further states that its website contains an "Official Zone Diet Newsletter" subscription page. Except as so admitted, ZonePerfect denies the remaining allegations of paragraph 16 of the Counterclaim.

17. ZonePerfect admits that it owns the following federal trademark and servicemark registration for the mark ZONE PERFECT® for products that includes, *inter alia*, nutrition bars: U.S. Trademark Registration No. 2,645,665 and U.S. Trademark Registration NO. 2,294,807. Except as so admitted, ZonePerfect denies the remaining allegations of paragraph 17 of the Counterclaim.

18. ZonePerfect denies the allegations of paragraph 18 of the Counterclaim.

19. ZonePerfect repeats and incorporates by reference the answers set forth in the prior paragraphs of this Answer to Hershey's Counterclaim.

20. No response to paragraph 20 of the Counterclaim is required, as it merely characterizes Hershey's request for relief, and/or states conclusions of law, and not averments of facts. To the extent the paragraph contains any factual allegations requiring a response, those allegations are denied.

21. ZonePerfect admits that it has filed a complaint in the above-captioned matter against Hershey and Sears, and that said documents speaks for itself. Except as so admitted, ZonePerfect denies the allegations of paragraph 21 of the Counterclaim.

22. ZonePerfect denies the allegations of paragraph 22 of the Counterclaim.

23. ZonePerfect denies the allegations of paragraph 23 of the Counterclaim.

24. ZonePerfect repeats and incorporates by reference the answers set forth in the prior paragraphs of this Answer to Hershey's Counterclaim.

25. No response to paragraph 25 of the Counterclaim is required, as it merely characterizes Hershey's request for relief, and/or states conclusions of law, and not averments of facts. To the extent the paragraph contains any factual allegations requiring a response, those allegations are denied.

26. ZonePerfect denies the allegations of paragraph 26 of the Counterclaim.

27. ZonePerfect denies the allegations of paragraph 27 of the Counterclaim.

28. ZonePerfect denies the allegations of paragraph 28 of the Counterclaim.

29. ZonePerfect repeats and incorporates by reference the answers set forth in the prior paragraphs of this Answer to Hershey's Counterclaim.

30. ZonePerfect admits that it owns federal Trademark Registration Nos. 2,645,655 and 2,294,807. Except as so admitted, ZonePerfect denies the allegations in paragraph 30.

31. ZonePerfect denies the allegations of paragraph 31 of the Counterclaim.

32. ZonePerfect repeats and incorporates by reference the answers set forth in the prior paragraphs of this Answer to Hershey's Counterclaim.

33. No response to paragraph 33 of the Counterclaim is required, as it merely characterizes Hershey's request for relief, and/or states conclusions of law, and not averments of facts. To the extent the paragraph contains any factual allegations requiring a response, those allegations are denied.

34. ZonePerfect denies the allegations of paragraph 34 of the Counterclaim.

35. ZonePerfect denies the allegations of paragraph 35 of the Counterclaim.

36. ZonePerfect denies the allegations of paragraph 36 of the Counterclaim.

37. ZonePerfect repeats and incorporates by reference the answers set forth in the prior paragraphs of this Answer to Hershey's Counterclaim.

38. No response to paragraph 38 of the Counterclaim is required, as it merely characterizes Hershey's request for relief, and/or states conclusions of law, and not

averments of facts. To the extent the paragraph contains any factual allegations requiring a response, those allegations are denied.

39. ZonePerfect denies the allegations of paragraph 39 of the Counterclaim.
40. ZonePerfect denies the allegations of paragraph 40 of the Counterclaim.
41. ZonePerfect denies the allegations of paragraph 41 of the Counterclaim.
42. ZonePerfect denies the allegations of paragraph 42 of the Counterclaim.

GENERAL DENIAL AND RESPONSE

ZonePerfect generally denies each and every remaining allegation contained in the Counterclaim that has not been previously admitted, denied or answered. ZonePerfect specifically denies that Hershey is entitled to any of the relief it requests.

AFFIRMATIVE DEFENSES

First Affirmative Defense

The Counterclaim fails to state a claim against ZonePerfect for which relief can be granted.

Second Affirmative Defense

The claims asserted in the Counterclaim are barred by the doctrines of waiver, estoppel, or laches.

Third Affirmative Defense

Hershey is barred from obtaining the relief it seeks in the Counterclaim in light of its unclean hands.

Fourth Affirmative Defense

Hershey is barred from obtaining the relief it seeks by the doctrine of fair use.

Fifth Affirmative Defense

Hershey is barred from obtaining the relief it seeks because it lacks a protectible interest in the word "SmartZone" or the word "Zone."

Sixth Affirmative Defense

If Hershey has suffered any damages, which is denied, Hershey's claims are barred because Hershey has failed to mitigate any such alleged damages.

Seventh Affirmative Defense

To the extent any damages were suffered by Hershey, which ZonePerfect expressly denies, any such damages were as the result of the negligence, carelessness, acts, omissions, fault or breaches of contract or obligations of persons other than ZonePerfect, including the Hershey itself and its agents and employees, over whom ZonePerfect has no control, and, accordingly, such acts bar any recovery against defendant in whole or in part.

Eighth Affirmative Defense

If Hershey has suffered any damages, which is denied, Hershey's claims are barred because the damages complained of were caused by the Hershey's own acts or omissions.

ADDITIONAL DEFENSES

ZonePerfect reserves the right to raise additional defenses after the completion of investigation and discovery.

REQUEST FOR RELIEF

WHEREFORE, ZonePerfect seeks:

- (a) That Hershey take nothing by its Counterclaim;
- (b) That Hershey's Counterclaim be dismissed and judgment entered for defendant on all counts thereof;
- (c) That this case be deemed an extraordinary matter pursuant to 15 U.S.C. §1117 and that ZonePerfect be awarded its costs of suit and reasonable attorneys' fees incurred herein; and
- (d) That ZonePerfect be awarded such other and further relief as the Court deems just and proper.

Respectfully submitted,

ZONEPERFECT NUTRITION COMPANY

By its attorneys,



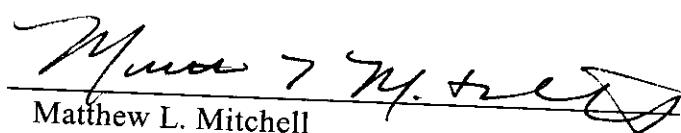
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Dated: June 7, 2004

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U.S. DISTRICT COURT
CLERK'S OFFICE
BOSTON, MASS.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon counsel for each defendant via facsimile and by hand to Ms. Arrowood and Mr. Adio and by mail to Mr. Smart this 7th day of June, 2004.


Matthew L. Mitchell

BINGHAM McCUTCHEON

June 7, 2004

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U.S. DISTRICT COURT
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Re: "ZonePerfect Nutrition Company v. Hershey Foods Corporation, Hershey Chocolate & Confectionery Corporation, Barry D. Sears and Zone Labs, Inc., Civil Action no. 04-10760-REK

Dear Sir/Madam:

Please find enclosed for filing ZonePerfect's Answer To Hershey Foods Corporation's and Hershey Chocolate & Confectionery Corporations' Counterclaims and Unclean Hands Defense.

Thank you very much for your assistance in this matter.

Very truly yours,

Matthew L. Mitchell
Matthew L. Mitchell

Enclosure

cc. Seni M. Adio, Esq.
Thomas A. Smart, Esq.
Lisa Arrowood, Esq.
Daniel L. Goldberg, Esq.